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No. 88-1402

In The

Supreme Court of the United States

October Term, 1988

BERNARD J. FLAYAC,

Petitioner,

v.

CRAIG HUMRICHOUSE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS HAINES, WALKER & SCOTT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Rule 50(a) of the Federal Rules of Civil Procedure should be interpreted to allow plaintiff in a diversity case to take his case to the jury despite his failure to present a prima facie case under the governing state law.

2. Whether Petitioner possesses standing to seek review of the evidentiary standards employed by the Eighth and Ninth Circuit Courts in reviewing directed verdicts where Petitioner has not suffered injury as a result of such standards.

3. Whether Petitioner may raise for the first time in his Petition issues which were neither presented to nor resolved by the Court of Appeals.

LIST OF PARTIES

The parties to the proceedings are the petitioner, BERNARD J. FLAYAC, respondent JAMES G. SCHWARTZ and his firm and the law firm of HAINES, WALKER & SCOTT.

RULE 28.1 LISTING

Respondent Haines, Walker & Scott has no parent company, subsidiaries or affiliates.

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STATEMENT OF CASE

Petitioner's description of the facts of the case is not accurate and is deceptive. The facts concerning the underlying transaction are accurately stated by the Court of Appeals in the opinion below and will not be repeated here. Since Petitioner's only allegations on appeal against respondent Haines, Walker & Scott ("HW&S") are that HW&S breached duties arising from escrow and/or trust relationships with Petitioner, only pertinent facts concerning those allegations are set forth herein.

In 1984, petitioner contracted with Gary Humrichouse, Craig Humrichouse and David Witt ("Humrichouses") for the purchase of three ARCO AM/PM Minimarts

from the Humrichouses. Both Flayac and the Humrichouses were represented by separate counsel in the transaction. Petitioner's attorneys were James Schwartz and his firm, and the Humrichouses were represented by their long-term attorneys, the law firm of Haines, Walker & Scott.

The facts concerning the alleged trust relationship are undisputed. Flayac deposited a portion of the purchase price into an HW&S trust account for the benefit of "GCD Investments, Inc.," ("GCD"), a client of HW&S. Flayac held no interest in GCD. GCD was owned by the Humrichouses. The Humrichouses later met with HW&S and directed that the money previously endorsed to them (via GCD) be released from the GCD trust account. On these facts, the District Court found that

HW&S could not be liable to Petitioner, since it acted in accordance with the unequivocal terms of the trust. Moreover, a written agreement between Flayac and the Humrichouses called for payment of the same money to the Humrichouses by Flayac. There was no evidence that HW&S owed a duty to Flayac based upon the GCD trust account.

HW&S similarly did not act as an escrow for Petitioner. Petitioner deposited the remaining portion of the purchase price into escrow accounts at Wells Fargo Bank. Petitioner testified at trial that he and the Humrichouses, without the advice of their attorneys, cancelled the escrow accounts. Petitioner personally withdrew the funds from the escrow accounts and paid these funds over

to the Humrichouses. This testimony was not disputed and Petitioner offered no evidence at trial concerning a purported escrow at HW&S. The trial court found, and the Ninth Circuit affirmed, that there was no evidence that an escrow was ever set up at HW&S.

Applying California law, the Northern District determined that Flayac had not presented any evidence to support his claim that HW&S owed duties to him arising out of either a trust or an escrow relationship and directed verdict in favor of HW&S immediately after plaintiff's case-in-chief. The Court of Appeals affirmed that there was no evidence of an escrow or trustee relationship between Flayac and HW&S, and since HW&S had not otherwise acquired a

fiduciary duty to Flayac, HW&S's duties ran only to its clients, the Humrichouses. Because there was no evidence of an escrow or trustee relationship, the Ninth Circuit unanimously affirmed the trial court's directed verdict on this issue.1/ Plaintiff did not present a prima facie case against HW&S.

SUMMARY OF ARGUMENT

Petitioner has failed to present a germane federal question in his Petition. When stripped of its hyperbole, the

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1/ Petitioner claims that the Court of Appeals was "split two to one on the issue as to whether this directed verdict was proper." This is incorrect. While Justice Fletcher concurred and dissented in part, she concurred with the majority opinion as to all issues related to the directed verdict in favor of HW&S.

Petitioner's purported federal question is neither logically sound nor relevant to the determination of this case. Verdict was directed in favor of HW&S because plaintiff could not present a prima facie case in accordance with California substantive law. The defense never had to present its case for consideration by either the court or the jury.

The purported "differing standards" employed by the Ninth Circuit and Eighth Circuit Courts of Appeals in reviewing evidence following a directed verdict have no relevance to this case and the assertion that they affected the outcome is illusory. The "differing standards" at issue concern the manner in which a District Court after trial is to consider the evidence presented by the

party in favor of whom verdict was directed after plaintiff establishes a prima facie case. Here, no evidence of HW&S was considered by the District Court or the Ninth Circuit, since the directed verdict in favor of HW&S was granted immediately after plaintiff's case rested and before HW&S's case-in-chief. Insufficient evidence was presented by plaintiff to establish even a prima facie case against HW&S. The case would be decided the same in either circuit. Thus, if such a "differing standard" exists, it has no impact upon the directed verdict in this case.

Similarly, the claim that there is a statistical imbalance of cases reaching trial between the Eighth Circuit and the Ninth Circuit thereby resulting in the

denial of a right to jury trial is misplaced as a purported federal question: Petitioner did reach trial. He failed, however, to present sufficient evidence to support his claims for relief against HW&S. Even if an imbalance exists, it did not impact Petitioner. He has no standing to raise this purported federal question since this imbalance did not prevent his right to a jury trial.

Moreover, the Supreme Court has repeatedly ruled that directed verdict procedures and standards are not violative of the Seventh Amendment guarantee of a right to trial by jury. Thus, Petitioner's claim that he has been deprived of his Seventh Amendment rights is without basis.

Petitioner's purported federal

question also fails for a more fundamental reason. Petitioner failed to raise these issues to the Ninth Circuit, either on appeal or in his petition for rehearing. This failure alone provides sufficient grounds to deny the Petition.

ARGUMENT

I. THE PETITION RAISES NO COMPELLING FEDERAL QUESTION AND OFFERS NO BASIS FOR THIS COURT'S REVIEW

A. Petitioner's Assertion That The Eighth Circuit Has Different Standards Of Review Is Illusory

Petitioner asserts that he may have obtained a different result in the Eighth Circuit. Petitioner relies on two cases which have no bearing upon the present case. Dace v. ACF Industries, Inc. 772 F.2d 274 (8th Cir. 1983) and

Taylor v. Cochran (8th Cir. 1987) 830 F.2d 900, cert. denied 108 S.Ct. 1476 (1988) are decisions involving federal employment discrimination claims. In each case, following the presentation of both plaintiffs' and defendants' case, the District Court concluded that, while the plaintiffs had established a prima facie case of discrimination, the defendants' evidence rebutted the plaintiffs' prima facie case. The Eighth Circuit found that because the evidence was contradicted, the trial court necessarily resolved issues of the credibility of witnesses in granting the defendants' motions for directed verdict. In each case, the Eighth Circuit held that resolving conflicting evidence and determining whether a prima facie case was rebutted should be decided by the

jury. Dace 722 F.2d at 376-379 and nn. 3 & 6; Taylor 830 F.2d at 902.

In this case, the court directed verdict immediately following the presentation of plaintiff's case in chief. No defense case was presented. In directing the verdict, the District Court properly concluded that petitioner failed to establish a prima facie case because he did not demonstrate that HW&S owed duties to Flayac. Neither Petitioner nor HW&S presented evidence establishing the existence of either an escrow or trust relationship between Flayac and HW&S, and for this reason, a verdict was directed in favor of HW&S. Thus, the District Court did not resolve credibility disputes or consider rebuttal evidence. There was nothing to rebut. Even if "differing

standards" exist, they could have no bearing on the outcome of this case. The outcome would be the same in either the Eighth or Ninth Circuits. The purported federal question is illusory.

B. Petitioner Lacks Standing To Assert That A Different Standard Should Have Been Applied To His Case

This Court's jurisdiction can only be invoked if petitioner has (or will) suffer actual injury as a result of the claimed wrongdoing. Warth v. Seldin 422 U.S. 490, 499 [95 S.Ct. 2197] (1975). If Petitioner lacks such an injury, he has no standing to pursue the issues contained in the Petition.

As set forth above the alleged disparate evidentiary standards employed by the Eighth and Ninth Circuits in

reviewing directed verdicts have no bearing upon the facts of this case. Determination of the "proper standard" will have no impact upon the outcome of this case. As such, Petitioner cannot show that he will or has been injured by application of "differing standards." Therefore, Petitioner lacks standing to raise the import of "differing standards" between the Eighth and Ninth Circuit in this case.

Similarly, Petitioner lacks standing to complain of the purported statistical imbalance of cases reaching trial in the Eighth Circuit Court of Appeals versus the Ninth Circuit Court of Appeals. Petitioner's case did reach trial; hence, any disparate "odds" did not affect him.

C. Flayac Has Not Been Deprived Of His Right To Jury Trial And The Purported Statistical Imbalance Is Irrelevant To This Case

Petitioner's claim that there is a statistical imbalance between the percentage of cases reaching trial in the Eighth and Ninth Circuits which is causally connected to the evidentiary standards employed on directed verdict is unintelligible and wrong. It is entirely unclear from the petition how this "statistical imbalance" affected Petitioner, since his case did reach trial. Indeed, had Petitioner's case not reached trial, the evidentiary standards of which he now complains would never have come into issue. Thus, if a greater percentage of cases reach trial in the Eighth Circuit, for whatever reason, it

certainly cannot be because of an evidentiary standard applied to motions for directed verdict. There is no apparent relationship between the two issues raised by Petitioner and neither individually impacts the outcome of this case.

Similarly, Petitioner's argument that the District Court's grant of HW&S's motion for directed verdict has deprived him of his right to trial by jury is without merit. The Supreme Court has repeatedly ruled that directed verdict procedures and standards are not violative of the Seventh Amendment guarantee of a right to trial by jury. For example, in Galloway v. United States 319 U.S. 372 (1943) the court stated:

> If the intention is to claim generally that the Amendment

> deprives the federal courts of the power to direct a verdict for insufficiency of evidence, that the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently, the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Id. at 389.

Petitioner's case was terminated on directed verdict not because of improper evidentiary standards or because the statistics were against him. HW&S prevailed at trial because there was no prima facie case. There was no evidence that HW&S owed any duty to Petitioner.

II. PETITIONER FAILED TO PRESENT THE ISSUES SET FORTH IN THE PETITION TO THE NINTH CIRCUIT AND CANNOT RAISE THEM NOW

At no point during the District

Court's consideration of HW&S's motion for directed verdict, or during Petitioner's appeal of the directed verdict to the Ninth Circuit, or in his petition for rehearing to the Ninth Circuit, did petitioner suggest that an incorrect evidentiary standard was considered by the trial court. Indeed, Petitioner made no claim that any of the evidence considered by the District Court or Court of Appeals should not have been considered. Petitioner's failure to raise this issue on appeal before the Ninth Circuit alone constitutes sufficient reason to deny the Petition. See, e.g., Delta Airlines, Inc. v. August 450 U.S. 346, 362 (1981).

CONCLUSION

The decision of the Court of Appeals, which affirmed the judgment of the District Court, was correct and Petitioner offers no basis for this Court's further review. Respondents HW&S respectfully request that the petition for writ of certiorari be denied.

Dated: March 24, 1989.

Respectfully submitted,

LONG & LEVIT

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